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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1967

No. 1394

LEVI SWINGLE, *Petitioner,*

v.

THE UNITED STATES OF AMERICA,
Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

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THE UNITED STATES OF AMERICA,
Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

Petitioner prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Tenth Circuit entered in the appeal of the petitioner on February 9, 1968.

CITATIONS TO OPINIONS BELOW

The United States District Court for the Western District of Oklahoma did not render an opinion. The opinion of the Court of Appeals, which is attached hereto as Appendix A, is reported at 389 F.2d 220 (1968).

JURISDICTION

The judgment of the Court of Appeals was entered on February 9, 1968. A petition for rehearing was denied on March 26, 1968.[1] The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

[1] By order of Mr. Justice White, the time allowed for filing this petition was extended to May 3, 1968.

QUESTION PRESENTED

Whether a defendant in a federal criminal case who is brought to trial by an original grand jury indictment and without the preliminary proceedings provided in Rule 5, Fed. R. Crim. P., for persons who are summoned before a committing magistrate or arrested with or without a warrant issued upon a complaint before indictment, is denied equal protection of the laws where before trial he is not afforded opportunities of confrontation and examination equivalent to those which are afforded in Rule 5 preliminary proceedings.

CONSTITUTIONAL PROVISION AND RULE INVOLVED

The Fifth Amendment to the Constitution provides:

> No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

Rule 5 of the Federal Rules of Criminal Procedure provides:

> **Proceedings before the Commissioner**
>
> (a) *Appearance before the Commissioner.* An officer making an arrest under a warrant issued upon a complaint or any person making an arrest without a warrant shall take the arrested person without unnecessary delay before the nearest available commissioner or before any other nearby officer impowered to com-

mit persons charged with offenses against the laws of the United States. When a person arrested without a warrant is brought before a commissioner or other officer, a complaint shall be filed forthwith.

(b) *Statement by the Commissioner.* The commissioner shall inform the defendant of the complaint against him and of any affidavit filed therewith, of his right to retain counsel, of his right to request the assignment of counsel if he is unable to obtain counsel, and of his right to have a preliminary examination. He shall also inform the defendant that he is not required to make a statement and that any statement made by him may be used against him. The commissioner shall allow the defendant reasonable time and opportunity to consult counsel and shall admit the defendant to bail as provided in these rules.

(c) *Preliminary Examination.* The defendant shall not be called upon to plead. If the defendant waives preliminary examination, the commissioner shall forthwith hold him to answer in the district court. If the defendant does not waive examination, the commissioner shall hear the evidence within a reasonable time. The defendant may cross-examine witnesses against him and may introduce evidence in his own behalf. If from the evidence it appears to the commissioner that there is probable cause to believe that an offense has been committed and that the defendant has committed it, the commissioner shall forthwith hold him to answer in the district court, otherwise the commissioner shall discharge him. The commissioner shall admit the defendant to bail as provided in these rules. After concluding the proceeding the commissioner shall transmit forthwith to the clerk of the district court all papers in the proceeding and any bail taken by him.

STATEMENT

The relevant facts may be briefly stated. Petitioner was tried before a jury in the Western District of Oklahoma upon an indictment charging him in one count under 18 U.S.C. § 371 with conspiracy to misapply national bank funds in violation of 18 U.S.C. § 656 and in fifty-two counts with separate substantive violations of 18 U.S.C. § 656. He was acquitted on the conspiracy count and on eight substantive counts. Convicted on the remaining substantive counts, he received concurrent sentences of three years and a fine of $5,000.

The criminal prosecution which ended in petitioner's conviction was not commenced by the making of an arrest or the filing of a complaint. Rather it was commenced by the presentation of evidence to a grand jury. Petitioner was first notified of the charges against him and taken into custody upon a warrant issued pursuant to Rule 9, Fed. R. Crim. P., following the return of the indictment. Accordingly there were none of the preliminary proceedings required by Rule 5, Fed. R. Crim. P., in the case of an accused who is summoned to appear in front of a committing magistrate or who is arrested with or without a warrant before indictment.

Before trial petitioner filed several discovery motions pursuant to which he obtained access to relevant documentary materials in the possession or control of the prosecution. His motion to produce the grand jury minutes was initially denied (R. 499), but before trial it was reconsidered in light of the decision in *Dennis v. United States*, 384 U.S. 855 (1966), and granted in part.[2] The motion to take depositions before trial was denied (R. 500). The motion for a

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[2]Production was requested of all grand jury minutes (R. 82). It was granted as to the testimony of two witnesses, only one of whom later appeared at trial (R. 107). All record references in this Petition are to the printed appendix on appeal, which consists of three volumes with consecutively numbered pages. All references in this Petition to Rules are to the Federal Rules of Criminal Procedure.

preliminary hearing before trial, repeatedly pressed by counsel on the ground that such a hearing was necessary in the preparation of the defense,[3] was also denied (R. 490). There were no evidentiary hearings or other proceedings of an adversary nature before trial.[4]

REASONS FOR GRANTING THE WRIT

Both the courts and the Congress are currently embarked on a profound reappraisal of pre-trial procedures in the system of federal criminal justice. Among its most visible manifestations are the Criminal Justice Act of 1964, 18 U.S.C. § 3006A, the Bail Reform Act of 1966, 18 U.S.C. § 3146, and decisions such as *United States v. Wade*, 388 U.S. 218 (1967), *Dennis v. United States*, 384 U.S. 855 (1966), and *Miranda v. Arizona*, 384 U.S. 436 (1966). However diverse in their object and reach these advances in statutory and decisional law may be, each gives defendant and defense counsel greater access to each other or to certain basic evi-

[3]The opinion of the court below deals with the denial of a preliminary hearing as though the motion had been based on Rule 5 grounds and presented only an issue of statutory interpretation (see App. A, 389 F.2d at 223. However, both in his motion (R. 82, 88-93, 134, 483-485) and on review petitioner asserted that a hearing was required on constitutional grounds.

[4]Petitioner was President of the First National Bank of Cushing, Oklahoma at the time of the transactions charged in the indictment. There was no allegation or proof that petitioner profited in any way from these transactions. At the trial petitioner relied heavily in his own defense on evidence of his good character (see R. 341-351), and the testimony adduced in this regard was of critical importance. Indeed at the sentencing proceedings the judge described petitioner as a "man of great human kindness" who "has been a great asset and a worker in the city of Cushing and in the community of Cushing and in Payne County" (R. 410). Yet the instruction which the judge gave to the jury on character evidence (R. 394) suggested that to warrant acquittal it must overcome the other evidence in the case "beyond a reasonable doubt." This instruction was disapproved in the court below (see App. A, 389 F.2d at 222), and if this petition is granted we will request the Court to consider this instruction issue as an alternative ground for reversal.

dentiary materials in the hands of the government, and each thereby reduces the chance that conviction will be obtained not because an accused is guilty but because he is uninformed.

The fundamental interest of an accused in being sufficiently informed about the charge to permit the assertion and protection of his legitimate defenses was frustrated by the procedure employed in this case. Specifically we refer to the procedure of original indictment coupled with the denial of an adversary hearing, in the nature of a preliminary hearing, before trial. We will show in part I below that there is a critical difference, as respects access to witnesses and information before trial, between that class of criminal defendants who are arrested before indictment and that class of defendants, including the petitioner, who are arrested after indictment. We will then show in part II below that this difference is unrelated to any purpose for which the classification between these two classes of defendants might reasonably have been made. If this is so, then the case involves an important constitutional question that has not been, but that should be, resolved by this Court.

I

The general view is that the return of an indictment "supersedes" and renders superfluous preliminary proceedings of the type authorized by Rule 5. The premises and merits of this view, as well as the confusion and controversy into which it has been brought by recent judicial decisions, will be examined later. We simply note here the several respects in which a preliminary hearing of the Rule 5(c) type is clearly of more value to an accused than a grand jury proceeding. We note also that the deficit thus created cannot be made up by use of the discovery rules which come into play after indictment.

Rule 5 Proceeding in Contrast to Grand Jury Proceeding.

From the standpoint of the protections which they afford an accused, a preliminary hearing is superior to a grand jury proceeding in the following respects:[5]

(1) The accused has a right to be present at the hearing and the corollary right to confront witnesses against him. He cannot be present in the grand jury as a matter of right, see Rule 6(d), and indeed is not entitled to be advised that he is under investigation by that body. If he does appear it is only for the purpose of giving his own testimony.[6]

(2) The accused has a right to have counsel appointed and to have counsel with him at the hearing, 18 U.S.C. 3006A(b) and Rule 44, Fed. R. Crim. P., whereas he has no right to counsel at the grand jury stage and may not be accompanied by counsel if he appears.

(3) Under Rule 5(c) the accused has a right to cross-examine witnesses against him and to call witnesses in his

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[5]They have been summarized in this manner: "[C]an it be seriously argued that probable cause determined by layman in secret under the guidance of the prosecutor and in the absence of the defendant and his counsel is anywhere near as protective of individual rights as the determination of probable cause by a judicial officer at a public preliminary hearing in the presence of the defendant and his counsel with the right of the defendant to cross examine and to present evidence in his own behalf." Statement of Samuel Dash, Hearings on Federal Magistrates Act Before the Subcommittee on Improvements in Judicial Machinery of the Senate Judiciary Committee, S. 3475, 89th Cong., 2d Sess., and S. 945, 90th Cong., 1st Sess., 139 (1966-1967).

[6]Orfield, The Federal Grand Jury, 22 F.R.D. 343, 425-426 (1959); see Kaufman, The Grand Jury—Its Role and Its Powers, 17 F.R.D. 331, 336 (1955). There is also authority that a prospective defendant may be called as a grand jury witness without his consent, although he may invoke his privilege against self-incrimination when he appears. *United States v. Cleary*, 265 F.2d 459 (2d Cir. 1959), *cert. denied*, 360 U.S. 936; Orfield, *supra* at 432.

own behalf,[7] whereas he cannot exercise any control over what witnesses appear before the grand jury and cannot cross-examine those that do appear.

(4) The Rule 5(c) hearing must be supported by a complaint, and to satisfy the demand of *Giordenello v. United States*, 357 U.S. 480 (1958), the complaint must itself provide a factual foundation for a reasonable belief in guilt. See *Jaben v. United States*, 381 U.S. 214, 224 (1965).[8] By contrast an indictment need only charge an offense in conclusory statutory language, thus giving the accused no factual information respecting its basis.

(5) The extent to which a magistrate's finding of probable cause may be based on hearsay evidence is not a settled question, see *Washington v. Clemmer*, 119 U.S.App. D.C. 216, 220, 339 F.2d 715, 719 (1964),[9] and may be of marginal importance in view of the defendant's right to subpoena witnesses having personal knowledge of the relevant facts. But it is well established that an indictment may be

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[7]This category includes witnesses whose testimony is relevant on the issue of probable cause, even though potentially they may be witnesses against the accused. *Ross v. Sirica*, __ U.S.App.D.C. __, __-__, 380 F.2d 557, 558-560 (1967); *Washington v. Clemmer*, 119 U.S.App. D.C. 216, 218, 339 F.2d 715, 717 (1964).

[8]"*Giordenello v. United States* . . . and *Aguilar v. Texas*, 378 U.S. 108, established that a magistrate is intended to make a neutral judgment that resort to further criminal process is justified. A complaint must provide a foundation for that judgment. It must provide the affiant's answer to the magistrate's hypothetical question, 'What makes you think that the defendant committed the offense charged?'"

[9]And see *Aguilar v. Texas*, 378 U.S. 108, 114 (1964), holding that while an affidavit in support of a search warrant may be based on hearsay, it must be hearsay corroborated as to both the particularity of the information and reliability of the informant. No court has ever applied a similar standard to the hearsay information supporting an indictment. But see *United States v. Arcuri*, 36 LW 2627 (E.D. N.Y., decided March 27, 1968), holding that an indictment is subject to dismissal if the prosecutor relied on hearsay alone to obtain it when he had better evidence available.

based on hearsay alone. *Costello v. United States*, 350 U.S. at 359, 363 (1956).

(6). The accused is entitled to a stenographic transcript of the preliminary hearing,[10] whereas he has limited access to the grand jury minutes, which in any event may not exist since grand jury proceedings need not be recorded.[11]

In the matter of comparative advantage to the accused, there is little to be said in favor of the grand jury proceeding. A grand jury may still protect him, in accordance with one of its historical uses[12], against unfounded or malicious prosecution, but the Rule 5(c) hearing provides no less assurance in this respect, and probably more in view of the fact that the probable cause finding is made by a judicial officer in a public proceeding whereas an indictment is voted in secret and needs the concurrence of only 12 of the 23 grand jury members. See Rules 6(a), 6(f), Fed. R. Crim. P.

Rule 5 Proceeding in the Context of Other Federal Rules Relating to Discovery and Disclosure.

Without attempting to define the full range of discovery which they permit, we submit that it is apparent that the rules which come into play after indictment–Rules 7(f)(bill of particulars), 15 (depositions), 16 (discovery and inspection), 17 (subpoenas) and 17.1 (pre-trial conference)– do

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[10] *Washington v. Clemmer, supra*, 119 U.S.App.D.C. at 218, 339 F.2d at 717; *United States ex rel. Wheeler v. Flood*, 269 F.Supp. 194, 198 (E.D.N.Y. 1967).

[11] *Orfield, supra* note 6 at 452. Indeed the grand jury proceedings in this case were only transcribed in part (R. 560). The Special Committee on Federal Rules of Procedure of the American Bar Association recommended in 1965 that Rule 6(a), Fed. R. Crim. P., be amended to provide that a reporter transcribe grand jury proceedings which are accusatorial in nature. 38 F.R.D. 95, 106. But the recommendation has not been acted upon.

[12] *Orfield, supra* note 6 at 394.

not operate singly or together to afford the accused the essential advantage of a preliminary hearing—the opportunity to confront witnesses having personal knowledge of the relevant facts and to take their sworn testimony in public and subject to cross-examination. This is as true today as it was before the general revision of the Federal Rules in 1966[13]. A bill of particulars, if granted, will yield only a written statement setting forth a very limited amount of detail about the offense. Depositions are limited by Rule 15 to the narrow category of prospective witnesses who it appears may be unable to attend the hearing or trial. Rules 16 and 17(c) will yield only tangible or documentary evidence for inspection, and Rule 17.1 leads only to a conference at which such matters as the marking of exhibits and the order of proof are generally discussed. Moreover, the grand jury minutes, even if they exist and are ordered produced, are limited in value by the facts that (1) the number and identity of the witnesses who appeared before the grand jury is decided by the prosecution; (2) the same witnesses may not appear at trial, and (3) if the same witnesses do appear, they cannot be effectively cross-examined on the basis of their prior testimony if it consisted of hearsay[14].

Petitioner exhausted available pre-trial discovery in this case without having an opportunity to confront or examine a single witness.

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[13]The amendments were submitted to the Congress on February 28, 1966, and became effective on July 1, 1966.

[14]See *United States v. Arcuri*, *supra* note 9.

II

Questions respecting the nature and purpose of preliminary proceedings in the system of federal criminal justice have been the source of much recent judicial controversy. The central issue in the dispute is whether the preliminary hearing has as its sole purpose the determination of probable cause for further restraint of the accused, with any discovery benefits being the mere incidental by-products of the hearing process, or whether it has as a coequal purpose the creation of discovery rights on the part of the accused and correlative obligations of disclosure on the part of the prosecution. It is not doubted that the preliminary hearing is a valuable discovery device for the accused—only whether this is its purpose or merely its effect.

The existing dispute is of central importance in this case. If, as we contend, the preliminary hearing has a discovery purpose independent of its purpose as a forum for the determination of probable cause, and rights of confrontation and examination are thereby created which are entitled to protection even after indictment, then it is our position that the denial of those rights to an accused such as petitioner who does not enter the criminal process until after indictment is a constitutionally impermissible discrimination. However, if we fail in our contention that discovery is a purpose of Rule 5, our position is that the discovery effects of this Rule are nonetheless so great as to deny that class of defendants from which they are withheld equal protection of the laws.

The Conflict Between the Circuits

In *Blue v. United States*,[15] a panel of the United States Court of Appeals for the District of Columbia Circuit accepted discovery as one of the main purposes of the pre-

[15] 119 U.S.App.D.C. 315, 322, 342 F.2d 894, 901 (1964), *cert. denied*, 380 U.S. 944 (1965). The Court stated therein:

"It has generally been thought that the purpose of a prelimi-

liminary hearing. While there is an apparent conflict on this point within the Circuit,[16] left unresolved by a recent refusal[17] of the Court to review *en banc* the question whether an indictment invariably moots any defects of a prior preliminary hearing, nevertheless the Court has acted as though the point were settled. On at least three occasions[18] it has either ordered the reopening of a preliminary hearing following indictment or ordered a new trial on the ground that the hearing was defective—decisions which make absolutely no sense if the only purpose of the hearing is to determine the existence of probable cause, since that determination is already concluded by the indictment. Moreover, the Court has prescribed procedural rights at the preliminary hearing, either as additions to those specified in Rule 5(c) or as implicit in the requirements of the rule, which further the objectives of discovery. It has held that a defendant is entitled to a stenographic transcript of the proceedings. *Washington v. Clemmer*, 119 U.S. App. D.C. 216, 218, 339 F.2d 715, 717 (1964). It has also held that a defendant is entitled under Rule 17(b) to the issuance of subpoenas for material witnesses, and since the issue to which the testi-

> nary hearing is to afford the accused (1) an opportunity to establish that there is no probable cause for his continued detention and thereby to regain his liberty and, possibly, escape prosecution, and (2) a chance to learn in advance of trial the foundations of the charge and the evidence that will comprise the government's case against him."

[16]Compare *Blue* with *Crump v. Anderson*, 122 U.S.App.D.C. 173, 352 F.2d 649 (1965), wherein another panel of the Court, with one judge dissenting, stated that a preliminary hearing is not intended as a means of discovery and therefore held that an accused is not entitled to such a hearing after indictment even though he was not afforded one following his arrest. And see *Dancy v. United States*, 124 U.S. App.D.C. 58, 361 F.2d 75 (1966), wherein a unanimous panel of the Court, relying on *Blue*, held that an accused who was not advised of his right to appointed counsel at the preliminary hearing was entitled to a new trial on the ground that counsel might have been able to exploit the discovery purpose of the hearing.

[17]*Ross v. Sirica*, __ U.S.App.D.C. __, 380 F.2d 557 (1967).

[18]*Ross v. Sirica, supra; Holmes v. United States*, 125 U.S.App.D.C. 143, 370 F.2d 209 (1966); *Dancy v. United States, supra*.

mony must be material is probable cause, the defendant can use subpoenas to compel the attendance and secure under oath the testimony of, among others, complaining witnesses and eyewitnesses. *Id.* at 220, 339 F.2d at 719; *Ross v. Sirica*, __ U.S. App. D.C. __, __-__, 380 F.2d 557, 558-560 (1967).

At least one other court, while acknowledging the probable cause determination as the "primary purpose" of the preliminary hearing, has stated that the hearing may provide an accused with "the most valuable discovery device available" and on this ground has held that the prosecution cannot circumvent the hearing by presenting the case to a grand jury. *United States ex rel. Wheeler v. Flood*, 269 F. Supp. 194, 198 (E.D.N.Y. 1967).

Other circuits have adopted the view that the Rule 5(c) hearing is designed to afford an accused a prompt hearing on the issue of probable cause, and that once this determination has been made by a grand jury and embodied in an indictment there is no further need for a hearing if one has not been held and presumably no remedy for a defect in any hearing that has been held.[19] Implicit in this view,

[19] *Sciortino v. Zampano*, 385 F.2d 132, 134 (2nd Cir. 1967) (some discovery of the government's evidence necessarily occurs at the preliminary hearing, but this "pure fortuity" should not be elevated "into a right to be enjoyed by an accused"); *Rivera v. Government of Virgin Islands*, 375 F.2d 988, 990 (3d Cir. 1967); *United States v. Aiken*, 373 F.2d 294, 298 (2d Cir. 1967), *cert. denied*, 389 U.S. 833; *Grace v. United States*, 375 F.2d 119, 120 (9th Cir. 1967); *United States v. Chase*, 372 F.2d 453, 467 (4th Cir. 1967), *cert. denied*, 387 U.S. 907 (conceding that hearing may serve as a "vehicle of pretrial discovery"); *United States v. Gilchrist*, 347 F.2d 715 (2d Cir. 1965); *United States v. Heap*, 345 F.2d 170, 171 (2d Cir. 1965); *Dillard v. Bomar*, 342 F.2d 789 (6th Cir. 1965), *cert. denied*, 382 U.S. 883; *Vincent v. United States*, 337 F.2d 891, 896 (8th Cir. 1964), *cert. denied*, 380 U.S. 988 (1965); *Byrnes v. United States*, 327 F.2d 825, 834 (9th Cir. 1964), *cert. denied*, 377 U.S. 970; *Boone v. United States*, 280 F.2d 911 (6th Cir. 1960); *Barrett v. United States*, 270 F.2d 772, 775 (8th Cir. 1959); *United States ex rel. Bogish v. Tees*, 211 F.2d 69, 72 (3d Cir. 1954); *Barber v. United States*, 142 F.2d 805, 807 (4th Cir. 1944), *cert. denied*, 322 U.S. 741. See also *Jaben v. United States*, 381 U.S. 214, 220 (1965).

whether the probable cause determination is called "the purpose" or "the sole purpose" or "the primary purpose" of the hearing, is a repudiation of the concept that Rule 5 guarantees an accused a valuable right of discovery which is more than a casual adjunct to the probable cause determination and which may be enforced after the need for such determination is extinguished by indictment.

Comment on the Conflict Between the Circuits.

As may be seen, the weight of authority is that an indictment "supersedes" a preliminary hearing. This view, as noted in *United States ex rel. Wheeler v. Flood, supra,* 269 F.Supp. at 197, is bottomed on the presumption that a Rule 5(c) proceeding and a grand jury proceeding serve essentially the same function in a criminal prosecution. In a superficial sense this presumption is valid. Both proceedings resolve the issue of whether there is sufficient evidence to warrant further action against the accused. If the relevant probable cause standard is met at the Rule 5(c) hearing, the magistrate will order the continued restraint of the accused, in jail or on bond, pending action by the grand jury. If applicable standards of proof are met at the grand jury, an indictment will be returned and will itself justify placing the accused under restraint pending trial or continuing his restraint if he was previously bound over by the magistrate. Since both proceedings are concerned with interim determinations of probable guilt, and since the action of the grand jury is subsequent to the action of the magistrate, it is easy to suppose that an indictment "supersedes" a Rule 5(c) hearing. Moreover the indictment is not only later in time but apparently higher in dignity. It is the means prescribed by the Constitution for bringing the serious offender to trial and is sufficient to do so if regular on its face,[20] whereas the Rule 5 (c) proceeding is only a statutory predicate for brief restraint.

This analysis has some legalistic appeal but it altogether misses the point. The proper comparison, in judging whether

[20] *Costello v. United States,* 350 U.S. 359, 363 (1956).

one "supersedes" the other, is not between the technical functions that the 5(c) hearing and the grand jury proceeding serve in clearing a case for trial. Nor is it between the respective positions which they occupy in the hierarchy of steps leading to trial. The point is what they offer in the way of practical and valuable protections for the accused. And by this measure, as has already been shown, there can be no doubt that the hearing is of superior rank.[21] It offers all the opportunities of an adversary proceeding whereas the grand jury offers all the disadvantages of an accusatorial proceeding.

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[21] The following are but a sampling of the many informed comments attesting to the discovery value of the hearing. *Holmes v. United States*, 125 U.S.App.D.C. 143, 144, 370 F.2d 209, 210 (1966) (an effective preliminary hearing "is one of the important rights of a defendant charged with crime" since it offers "a chance to learn in advance of trial the foundations of the charge and the evidence that will comprise the government's case against him."); *United States ex rel. Wheeler v. Flood*, 269 F.Supp. 194, 198 (E.D.N.Y. 1967) ("in practice this hearing may provide the defense with the most valuable discovery device available to him"); Rezneck, The New Federal Rules of Criminal Procedure, 54 Geo. L. J. 1276, 1302 (1966) (while counsel can rarely secure dismissal of the complaint and discharge of the accused at the hearing, what he "can achieve is the advantage of participating in an adversary proceeding with the right of cross-examination of government witnesses, and thereby causing the government to set out at least the basic outlines of its case."); E. Barrett Prettyman Fellows 1965-1966, The Preliminary Hearing in the District of Columbia, 7-8 (1967) (There is "no doubt that the hearing is a critical tool in trial preparation. If used properly, the crucial facts of the government's case, including names of potential witnesses, statements made by the defendant, and physical evidence in the government's possession, can be discovered. Moreover, since the hearing is transcribed or recorded, the testimony is preserved for potential trial use in refreshing recollection or impeachment. For these reasons, preliminary hearings SHOULD NEVER BE WAIVED.").

Petitioner Was Denied Equal Protection

As two courts[22] have recognized in rejecting an argument that discovery is among the purposes of Rule 5, the acceptance of such a view would create an irrational and wholly arbitrary distinction between those who are arrested before indictment and those who are not taken into custody until the grand jury has acted.

Concededly there may be valid and perhaps even compelling reasons to commence a prosecution against some defendants at the grand jury stage and against others by summons or arrest and preliminary Rule 5 proceedings.[23] To the extent that there are relevant differences between them it may be reasonable to differentiate between these two classes of criminal defendants. But it is not reasonable, and runs afoul of the constitutional guarantee of equal protection, to accord to the two classes significantly different treatment unrelated to the differences between them. Our position is that a judgment by the police or prosecuting authorities as to when

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[22] *Sciortino v. Zampano*, 385 F.2d 132, 134 (2d Cir. 1967):

> "It defies logic, for example, to allow such discovery to defendants who happen to be arrested before and to deny it to those who are arrested after indictment."

United States v. Motte, 251 F.Supp. 601, n. 3 at 605 (S.D.N.Y. 1966):

> "The sum total of the decision (*Blue v. United States*, supra), if viewed in this light, is to accord to a defendant indicted after apprehension a right to discovery not available to defendants apprehended after indictment, namely, the right of a preliminary hearing to discover the Government's evidence."

[23] Some of the relevant considerations might be the risk of flight from the jurisdiction, an immediate threat to the safety of others, and the need to time the arrest to assure a productive incidental search. Of course the desire of the prosecution to deny information to an accused would not itself be a valid reason for going directly to the grand jury. Yet there are indications that the indictment process is frequently used to circumvent the preliminary hearing. See *United States ex rel. Wheeler v. Flood*, 269 F.Supp. 194, 196-198 (E.D.N.Y. 1967). See also Moore's Federal Practice, Cipes, Criminal Rules § 5.04(1).

and how to take an accused into custody does not furnish a rational basis for deciding how much information about the charge will be made available to him before trial.[24] There is simply no reasonable relationship between the means by which the prosecution is commenced and the need of an accused for information with which to prepare for trial. And yet, as we have shown, there are crucial differences in the disclosure which is made to the accused if he is charged on the one hand by summons or arrest followed by Rule 5 proceedings and on the other hand by original indictment.

Moreover, while we believe our equal protection contention would be strengthened should this Court conclude that discovery *is* a purpose of Rule 5 proceedings, such a determination is not essential to our position. Whatever the purpose of Rule 5, its effect, when considered in conjunction with grand jury proceedings, is to provide to one class of criminal defendants discovery rights vastly superior to those accorded to another class. Arguably that discrimination could be justified if the fact of arrest or of summons gave rise to a constitutional requirement that the Rule 5 rights be accorded the accused. But there is no such requirement. In such circumstances, we suggest that there is a limit to the preferential treatment that can be granted one group of criminal defendants and withheld from another, and that that limit has been transgressed in this case.

Nor can the discrimination of which we complain be justified on the theory that discovery rights of the sort given

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[24] "The rights to be present to confront one's accuser, to cross examine, to present evidence, to be represented by counsel at a preliminary hearing are not procedural niceties, but are basic substantive rights once they are given—and essential to our adversary system. It appears shocking to me that it is the prosecutor who may at his sole discretion decide whether an arrested person will be permitted to have these rights by simply choosing an alternative mode of initiating the criminal proceedings. Under such circumstances they are illusory rights indeed." Statement of Samuel Dash, *supra* note 5 at 140.

under Rule 5 are not constitutionally required for *any* class of defendants. This is no defense to an equal protection claim, as this Court has squarely held. *Griffin v. Illinois*, 351 U.S. 12, 18 (1956). See also *Baxstrom v. Herold*, 383 U.S. 107 (1966). Our point is that since the Federal Rules *do* make provision for a preliminary hearing for persons arrested or otherwise restrained before indictment, even though such a hearing would not be compelled by the Constitution, persons arrested after indictment are entitled to the same opportunity to learn the foundations of the charge against them in advance of trial.[25]

Prejudice

Because it can never be shown that events would have taken a different course had an accused had access to additional information, prejudice must always be speculative where there is a claimed denial of a discovery right. Where the right involved, as here, is a basic constitutional protection and would have been of such obvious value if granted, there is already an informed basis for speculating that the accused was prejudiced. Nothing more should be required. "The determination of what may be useful to the defense can properly and effectively be made only by an advocate." *Dennis v. United States*, 384 U.S. 855, 875 (1966).

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[25] Our point is the same respecting the suggestion, see *Sciortino v. Zampano*, 385 F.2d 132, 134 (2d Cir. 1967), *Crump v. Anderson*, 122 U.S.App.D.C. 173, 352 F.2d 649 (1965), that the field of discovery in federal criminal practice is pre-empted by Rules 7(f), 15, 16, 17, and 17.1, and that the rulemakers could not therefore have intended that Rule 5(c) operate as a further discovery right of the accused. The fact is, as has been shown, that Rule 5 does operate to give an accused an important discovery advantage for which the other rules, even as enlarged in scope by the 1966 revision, do not provide a practical equivalent.

CONCLUSION

For the reasons set forth above, this petition for certiorari should be granted.

Respectfully submitted,

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APPENDIX A

[Filed February 9, 1968]

UNITED STATES COURT OF APPEALS
TENTH CIRCUIT

JANUARY TERM - 1968

LEVI SWINGLE, Appellant,

v. No. 9249

UNITED STATES OF AMERICA,
Appellee.

APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF OKLAHOMA
Criminal No. 66-70

Joe A. Moore, Memphis, Tennessee, and Jack B. Sellers, Sapulpa, Oklahoma, for appellant.

John W. Raley, Jr., Assistant United States Attorney (B. Andrew Potter, United States Attorney, Oklahoma City, Oklahoma, with him on brief) for appellee.

Before WOODBURY,* LEWIS and HICKEY, Circuit Judges

HICKEY, Circuit Judge

*Senior Circuit Judge of the First Circuit, sitting by designation.

Following a grand jury indictment, the appellant, Levi Swingle, was tried and convicted of misapplying the funds of a national bank in violation of 18 U.S.C. § 656 and § 2. The jury convicted Swingle of 44 counts and acquitted him of the first nine counts. It is contended the following errors occurred during the trial:

(1) Multiple documents were admitted in evidence based upon their identification as bank records. Swingle contends the documents were not linked up with the charges made and, therefore, are irrelevant and immaterial.

(2) The character instruction given was improper.

(3) The court failed to instruct that mal-administration or the exercise of bad judgment does not constitute an offense under the provisions of 18 U.S.C. § 656.

(4) The court failed to instruct that the payment of overdrafts, without more, does not violate 18 U.S.C. § 656.

(5) Cross-examination was unduly restricted.

(6) The totality of the pre-trial procedure deprived Swingle of due process of law.

Swingle was the president of a national bank in Cushing, Oklahoma. George E. Reagin was a customer of the bank. Beginning on January 4, 1961, and continuing intermittently during the years until March 23, 1964, Swingle made credit available to Reagin and his enterprises by various bank transactions, including the honoring of checks presented for payment when the Reagin account with the bank was insufficient to satisfy the payment demands. In addition to the checks honored there were six credit transfer transactions designed to benefit Reagin and his enterprises.

Several defenses were presented on Swingle's behalf, including character and reputation evidence; however, the principal defense relied upon by Swingle was that "[t]he payment of the overdrafts, or the cashing of checks drawn by one who has no funds on deposit with the drawee bank, by an officer of a bank is not an offense under the federal statute if, in making such payments, the officer acts in good

faith believing the drawer will be able to repay the money when required. . . ." 10 Am.Jur.2d Banks § 228 (1963). The first nine counts of the indictment involved eight transactions occurring in 1962 which predate a series of conferences held November 24, 25 and 26, 1962, at which time Swingle should have learned the economic plight of Reagin and should have known Reagin would not be able to pay the money or credit advanced when required. The jury apparently recognized this for it convicted Swingle on all counts charging transactions after the date of the conferences, beginning with count ten which charged a transaction occurring on March 27, 1963, and acquitted the accused of the first nine counts.

The appellant's "scatter-gun attack" relating to the exhibits received in evidence has been recently discussed and disapproved. Wall v. United States, 384 F.2d 758 (10th Cir. 1967). As in that case, the record here indicates appellant was afforded adequate opportunity to object to the various exhibits on the grounds of materiality and relevancy.

The character instruction given[1] would not be adopted by this court as a model instruction and is not recommended. This court has re-evaluated the contents of the "standing alone" instruction heretofore approved and concluded that the giving of the instruction is not compelled in all cases in which evidence of good character is admitted. Oertle v. United States, 370 F.2d 719 (10th Cir. 1966). "It is important . . . that the appellants, for their defense, did not rely solely on good character evidence; such evidence was, in fact, only incidental to the prime defense." Id. at 727. Here, Swingle's defense of good character was merely inci-

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[1] "If you are satisfied from the evidence in this case that the defendant Levi Swingle was a man of good character and repute in the community in which he resided, you should give that fact due weight. Such evidence of good character and repute may alone create a reasonable doubt as to the guilt of the defendant, when such evidence overcomes in your mind, beyond a reasonable doubt, the other evidence in this case."

dental to his prime defense of good faith. Although related, the distinctiveness of each defense is exemplified by the jury's finding that Swingle acted in good faith until he reached a point where, despite his good character, he acted in violation of the federal statute. Further, because good character was not Swingle's sole defense, the "standing alone" instruction is relegated to the status of the other instructions given; as such, error must be objected to in compliance with Fed. R. Crim. P. 30. Proper objection was not made by Swingle, and the instruction given was not fundamental error.

After the instructions had been given to the jury, the court asked both parties if they cared to make any further record with reference to the trial of the case. Both parties answered in the negative. Fed. R. Crim. P. 30 provides: "No party may assign as error any portion of the charge or omission therefrom unless he objects thereto before the jury retires to consider its verdict. . . ." See, Nutt v. United States, 335 F.2d 817 (10th Cir. 1964).

Considering the instructions in toto, together with the acquittal of the accused on counts one through nine, we believe the instructions fairly presented the appellant's defense theory and absent timely objection pursuant to Fed. R. Crim. P. 30, they will not be further considered.

The evidence shows there was more than the payment of overdrafts. In most instances, the checks paid were never recorded in the bank books by an appropriate debit entry. The insufficient funds checks were held and presented each day without posting. There is no evidence that deposits to cover the constantly recurring payments were required. The nature of the banking business in our society requires the officers to exercise the highest degree of honesty in their administration of bank funds. The transactions in this case constitute more than the payment of overdrafts and are evidence of misapplication of the funds of the bank.

The court permitted evidence that other customers had overdrafts at various times to be offered in defense of the

charges. None of the other customers' overdrafts reached the large amounts shown to have been accorded Reagin. Appellant contends cross-examination was unduly restricted because during cross-examination of the F.B.I. accountant who investigated this case, the following transpired:

> "Q. Well, did you at any time of your investigation of this bank ever look at the insufficient funds checks or the record of the insufficient funds turn-back checks of other customers in this bank besides Mr. Reagin?
>
> A. Yes, sir.
>
> Q. And you knew, did you, Mr. Peery, that there were many customers who were being accommodated over long periods of time by these insufficient funds checks that were held as an accommodation?
>
> Mr. Raley: We will object to that, your Honor, being completely immaterial to any issue before this Court.
>
> The Court: What difference does it make, Mr. Sellers, about the others? We are talking about this case here.
>
> Mr. Sellers; Well, your Honor, it runs to the intent of Mr. Swingle. They have alleged a conspiracy, your Honor, with this particular customer.
>
> The Court: They'd have to show that Mr. Swingle did or did not supervise the other accounts. I think the objection is sustained."

The witness was not asked the question suggested by the court, but cross-examination was continued on another matter. We do not think the cross-examination was unduly curtailed.

As a final point, Swingle contends "the totality of the pre-trial procedure effectively deprived the defendant of due process of law." This "scatter-gun attack" does not identify a specific error under the Federal Rules of Criminal Procedure. Under the guise of proposing more liberal discovery in this case, appellant argues that the trial court erred in not granting a continuance of the trial of this cause for

a period of time which he concludes would be required to inspect all the bank records. The court did grant a continuance for the purpsoe of additional discovery and its actions w were justified. Bear v. United States, 384 F.2d 132 (10th Cir. 1967); Lewis v. United States, 277 F.2d 378 (10th Cir. 1960). The accused wanted to examine all of the bank books in private to determine whether or not they might constitute evidence with respect to the guilt or innocence of Swingle. The motion made purports to be under Fed. R. Crim. P. 16. It was not made within ten days after arraignment as is required under Rule 16(f) and there was no showing that the attorney for the government had these records in his possession, custody or control. A motion was also made under Rule 17.1 for a pre-trial procedure. These motions are now being argued without any effort having been made to obtain a subpoena duces tecum directing the bank to disclose specific materials. Appellant, by his argument, makes it apparent that he seeks to accomplish what the Supreme Court of the United States in Bowman Dairy Co. v. United States, 341 U.S. 214 (1951) specifically said could not be done. In the Bowman case, a defendant sought by subpoena to obtain records which "' are relevant to the allegations or charges contained in said indictment, whether or not they might constitute evidence with respect to the guilt or innocence of any of the defendants. . .'" The Supreme Court stated: "This is a catch-all provision, not intended to produce evidentiary materials but is merely a fishing expedition to see what may turn up. The clause is therefore invalid." Id. at 217.

Swingle argues that he should have been afforded a preliminary hearing to require a full disclosure of the government's case; however, Fed. R. Crim. P. 5 specifically says, "An officer making an arrest under a warrant issued upon a complaint or any person making an arrest without a warrant shall take the arrested person without unnecessary delay before the nearest available commissioner. . . ." Provision (c) of that rule provides for a preliminary examination. In

the case at bar the appellant was arrested upon a grand jury indictment. No provision is found in the rules for a preliminary examination under this circumstance.

An additional attack is made upon indictment by a grand jury. Fed. R. Crim. P. 6 provides for indictment by grand jury.

The foregoing examples of appellant's totality argument of deficiencies in pre-trial procedure indicate the reasons for the court's dismissal of his argument as a "scatter-gun attack" not identifying the error within the rule.

AFFIRMED.